DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of Preemption of Local Zoning Regulation of Satellite Earth Stations	IB Docket No. 95-59
In the Matter of Implementation of Section 207 of the Telecommunications Act of 1996 Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service	CS Docket No. 96-83

JOINT COMMENTS OF
NATIONAL APARTMENT ASSOCIATION
BUILDING OWNERS AND MANAGERS ASSOCIATION
NATIONAL REALTY COMMITTEE
INSTITUTE OF REAL ESTATE MANAGEMENT
INTERNATIONAL COUNCIL OF SHOPPING CENTERS
NATIONAL MULTI HOUSING COUNCIL
AMERICAN SENIORS HOUSING ASSOCIATION
NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS

Summary

In its newly-adopted rules regarding restrictions on placement of DBS, MMDS and broadcast receiving antennas, the Commission correctly imposed limits on the reach of its preemption under Section 207 of the Telecommunications Act of 1996 (the "1996 Act"). The Commission need not and should not make any further attempt to limit conditions imposed by leases or

agreements governing the use of multi-unit, revenue-producing real estate or affecting the use of common areas.

The Commission has no reason to extend its preemption beyond that initially adopted in its order of August 6, 1996. The statute does not require the preemption of all restrictions, nor does it specify that restrictions imposed in residential or commercial leases or similar real estate agreements are to be preempted. The statute is aimed only at governmental restrictions and certain defined non-governmental restrictions. It clearly does not apply to limitations on revenue-producing real properties.

For the Commission to force building owners to allow the mounting of antennas of any kind on the owners' premises would constitute an unconstitutional physical taking of property under Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1987). Such a physical invasion is a per se taking that cannot be saved by any balancing test. See Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994). Loretto not only stands for the proposition that requiring owners to permit the placement of antennas on their properties would be a taking, but also for the proposition that to give such a right to tenants themselves is equally a taking. The fact that a building owner has invited the tenant onto the premises does not mean the owner has surrendered its Fifth Amendment rights. Giving the tenant the right to use the property in a new way -- that is, to occupy the property with the tenant's facilities -- constitutes a taking just as surely as

if the government had attempted to convey full title in that part of the premises to the tenant.

Giving tenants the right to install antennas may defeat the ostensible purpose of any regulation. Loretto indicates that, in many states, such tenant installations may be deemed fixtures and therefore the property of the building owner. Unless the Commission were prepared to preempt state fixtures law, it would be unable to establish a uniform right to receive services.

Any attempt to force building owners themselves to enter a new line of business installing facilities for the benefit of their residents or providing "reception service" would similarly constitute a regulatory taking. Section 207 must be construed in light of the fact that Congress has given the Commission no power to effect any Fifth Amendment taking. Bell Atlantic, 24 F.3d at 1446. The Commission has no power of eminent domain, either under the Communications Act or any other provision of law. Moreover, Congress has not authorized the Commission to incur fiscal liability for any takings, and for the Commission to do so here would violate the Anti-Deficiency Act.

Section 207 absolutely does not confer upon members of the public any general right to watch television using certain types of equipment, regardless of any other legal, technical or practical constraints, nor does it require building owners to provide tenants, occupants, and residents with "reception service."

The Commission lacks jurisdiction generally to regulate contractual agreements affecting private property and has no authority to regulate the real estate industry. Therefore, the Commission cannot direct property owners to install facilities for the benefit of tenants. Section 207 contains no grant to the Commission of new express authority -- by its terms the section invokes only prior-existing authority in Section 303 of the Communications Act -- and it omits any invocation of the Commission's so-called implied authority in Section 4(i) of the Act.

There are immense practical difficulties associated with any scheme that would allow tenants to install their own antennas, or request that service providers install them. Proposals for installing antennas for shared use raise just as many problems. This is not an area that the Commission can effectively regulate, and neither the Commission nor the courts are prepared for the inevitable litigation regarding interpretation of lease provisions and the consequences of allowing uncontrolled installation.

Finally, the real estate marketplace is highly competitive and is responding to the desires of its customers. The Commission need not attempt to supplant free market regulation.

TABLE OF CONTENTS

Page

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
Preemption of Local Zoning Regulation of Satellite Earth Stations	)	IB Docket No. 95-59
In the Matter of	)	
Implementation of Section 207 of the Telecommunications Act of 1996	)	CS Docket No. 96-83
Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service	)	

JOINT COMMENTS OF
NATIONAL APARTMENT ASSOCIATION
BUILDING OWNERS AND MANAGERS ASSOCIATION
NATIONAL REALTY COMMITTEE
INSTITUTE OF REAL ESTATE MANAGEMENT
INTERNATIONAL COUNCIL OF SHOPPING CENTERS
NATIONAL MULTI HOUSING COUNCIL
AMERICAN SENIORS HOUSING ASSOCIATION
NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS

Introduction

The joint commenters, representing the owners and managers of multi-unit properties,[1] believe that the Commission

[1] The joint commenters are the National Apartment Association ("NAA"); the Building Owners and Managers Association International ("BOMA"); the National Realty Committee ("NRC"); the Institute of Real Estate Management ("IREM"); the International Council of Shopping Centers ("ICSC"); the National Multi Housing Council ("NMHC"); the American Seniors Housing
(continued...)

was correct in imposing limits on the reach of Section 207 of the 1996 Act in the rules issued in its Report and Order herein, released August 6, 1996 (the "FNPRM"). The FNPRM asks whether the Commission should amend its new rules or issue additional rules to address the placement of antennas on leased property and in common areas of multi-tenant properties. We urge the Commission to proceed no further.

Any attempt to extend the current rules to common areas or to multi-unit, income-producing property subject to leases or

---

[1](...continued)
Association ("ASHA"); and the National Association of Real Estate Investment Trusts ("NAREIT"). NAA is the largest industry-wide, nonprofit trade association devoted solely to the needs of the apartment industry. Founded in 1907, BOMA is a federation of ninety-eight local associations representing 15,000 owners and managers of over six billion square feet of commercial properties in North America. NRC serves as Real Estate's roundtable in Washington for national policy issues. NRC members are America's leading real estate owners, advisors, builders, investors, lenders, and managers. The IREM represents property managers of multi-family residential office buildings, retail, industrial and homeowners association properties in the U.S. and Canada. Founded in 1957, ICSC is the trade association of the shopping center industry. Its 32,000 members in 60 countries include owners, developers, managers, retailers, lenders, and others having a professional interest in the shopping center industry. ICSC's 29,000 U.S. members represent almost all of the 41,000 shopping centers in the United States. NMHC represents the interests of more than 600 of the nation's largest and most respected firms involved in the multi-family rental housing industry, including owners and managers of cooperatives and condominiums. ASHA represents the interests of the larger and most prominent firms in the country participating in the seniors housing industry. NAREIT represents over 260 real estate investment trust members and supporting professionals in the fields of law, accounting and investment banking.

The joint commenters are also filing a response to the regulatory flexibility analysis required by P.L. 96-354, 5 U.S.C. § 601 et seq., as recently amended by P.L. 104-121.

similar real estate agreements[2] would raise serious questions involving the Constitution and the Commission's statutory authority. Therefore, we urge the Commission not to extend its current rules, for all the reasons set forth in our earlier filings in these two dockets.[3]

To force property owners to accept the emplacement on their property of antennas owned by telecommunications providers, tenants, residents or occupants would constitute an unconstitutional taking in violation of the Fifth Amendment.

Moreover, even if the Fifth Amendment were not implicated by a particular regulatory proposal, the Commission lacks the statutory jurisdiction to regulate contractual agreements affecting private property, 47 U.S.C. § 303, and Section 207 of

---

[2] The term "similar real estate agreements" is used to refer to arrangements and agreements regarding commercial property that are not in the typical form of leases between landlords and tenants, but serve some of the same functions as a lease. For example, it is common in shopping centers for some major tenants, such as department stores, not to be lessees of the shopping center owner, but to either own their premises in fee or to occupy and operate their premises as lessees of third parties. Whatever their ownership or lease arrangements, all such parties enter into agreements that impose limitations on their operations and the use of their premises and the common areas of the shopping center, including the roof. Those limitations are the same as the limitations imposed on stores that lease their space directly from the shopping center owner. In addition, a number of office buildings and office parks have similar arrangements.

[3] Those filings include Joint Comments of NAA, et al. in IB Docket No. 95-59, filed April 15, 1996 (the "Joint DBS Comments"); Joint Reply Comments of NAA, et al. in IB docket No. 95-59, filed May 6, 1996; Joint Comments of NAA, et al. in CS Docket No. 96-83, filed May 6, 1996; and Joint Reply Comments of NAA, et al. in CS Docket 96-83, filed May 21, 1996 (the "Joint MMDS Reply Comments").

the 1996 Act does not authorize intrusion on common areas or interference with the landlord-tenant relationship or that arising from similar real estate agreements. The Commission should abandon any attempt to deal with placement of antennas on property subject to leases or similar real estate agreements and in common areas, and should allow market forces to work freely in the competitive real estate market.

I. EXTENDING THE COMMISSION'S ANTENNA RULES TO PRIVATE LEASES AND SIMILAR REAL ESTATE AGREEMENTS FOR INCOME-PRODUCING, MULTI-UNIT PROPERTY OR TO COMMON AREAS WOULD VIOLATE THE FIFTH AMENDMENT.

As we have explained in our earlier filings, any attempt by the Commission to compel the owners of multi-unit buildings to allow the placement of antennas and associated wiring and equipment in or on their buildings or surrounding property by third-party telecommunications providers, tenants, occupants or residents would violate the owners' rights under the Fifth Amendment.[4] Involuntary emplacement of such facilities would be a "taking" within the meaning of the Fifth Amendment, as held by the Supreme Court in Loretto v. TelePrompTer Manhattan CATV Corp., 458 U.S. 419 (1982). Loretto applies equally to facilities owned by tenants and third party service providers and to facilities installed on leased premises and in common areas, and the Commission has not been granted the power of eminent domain. Loretto also indicates that granting tenants the right to install their own antennas would raise all the complexities of

---

[4] Joint DBS Comments at 3-6; Joint MMDS Reply Comments at 2-5.

state fixture law, since some or all of the facilities installed by a tenant might become the building owner's property. Therefore, the Commission should abandon any attempt to regulate in this area.

A. Giving Tenants or Service Providers the Right to Install Antennas Anywhere in a Building Would Result in a "Permanent Physical Occupation" Governed by Loretto.

Where the "character of the governmental action," the Supreme Court has said, "is a *permanent physical occupation* of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." Loretto, supra, at 434-35 (emphasis supplied), citing Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). Under Loretto, it makes no difference how extensive the physical occupation happens to be. Despite the argument of the broadcast satellite industry,[5] there can be no doubt that the installation of an antenna is just as permanent as the installation of wires in Loretto. Therefore, if the Commission grants third parties the right to install antennas on premises subject to leases or similar real estate agreements or in common areas, it will have effected a taking of the owner's property.

In addition, although Loretto did not address the consequences of giving such rights to a tenant rather than to a

---

[5] Further Reply Comments of the Satellite Broadcasting and Communications Association of America in Docket No. 95-59, filed May 6, 1996, at 5-6 ("Reply Comments of SBCA").

third party with no prior right to occupy the premises, the result is the same in either case.

Some interested parties have attempted to argue that Loretto simply does not apply because the Supreme Court stated that it was not addressing the case of a tenant's right to install wires, as opposed to a third party's right.[6] This is a misstatement, however. What the Court actually said was "[i]f [the New York law] required landlords to provide cable installation if a tenant so desires, the statute might present a different question from the question before us, since the landlord would own the installation." Loretto at 440, n. 19 (emphasis added). The Court clearly believed that under New York law any facilities installed to serve the tenant would belong not to the tenant but to the landlord. Thus, this statement says nothing to undercut the argument that granting the tenant the right to install facilities under the tenant's ownership and control would effect a taking of the landlord's property.[7]

Furthermore, what this passage really does is illustrate the complexity of the issue before the Commission, since the effects of any regulation may depend on state fixtures law. If tenants have the authority to install their own antennas, the

---

[6] See, e.g. Reply Comments of SBCA at 5; Reply Comments of DIRECTV at 8.

[7] The statement on which the satellite industry puts so much weight proves nothing more than that the Court was only deciding the case immediately before it. The Court certainly did not imply that the outcome in such a case would necessarily be different.

Commission's task will quickly become unmanageable. Each tenant's rights will depend on the fixtures law of the applicable state -- which will often mean that the tenant or resident will have spent hundreds of dollars to "improve" the building owner's property. This will inevitably lead to disputes -- many disputes -- over who owns the antenna. The Commission will surely be dragged in at some point to decide whether its rules preempted state law, and what the effects of any preemption might be. Even assuming that the Commission has the authority to preempt state fixture laws, it will be difficult if not impossible to ensure a uniform result -- which is exactly what the proponents of regulation claim to seek.

In any case, the logic of Loretto must apply when the tenant has the right to install and retain ownership over facilities. The tenant is granted access only for certain purposes and under certain terms. Granting the right to install antennas expands the rights granted in a lease in a way that -- just as in Loretto -- mandates a physical occupation of the property. This physical occupation is over and above the rights that the tenant was originally granted and is paying for. Therefore, giving a tenant new rights is indistinguishable from granting a third party the same rights.

For example, if the government were to declare that all persons occupying property under color of a lease were henceforth to hold ownership of the property in fee, the courts would unquestionably declare such an act a taking under the Fifth

Amendment, even though the tenant was already on the premises at the invitation of the owner. Because there is a physical invasion involved here, giving the tenant the right to occupy the property with the tenant's equipment is analytically no different than actually giving the tenant title to the property.

Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441, (D.C. Cir. 1994) makes an analogous point. That case clearly forbids the Commission from forcing access to real property owned by regulated entities, no matter how laudable the Commission's goals. The mere fact that Bell Atlantic chose to engage in a business subject to Commission regulation did not mean that the company had given up its Fifth Amendment rights. By the same token, it is not enough to argue that the owner of the property has given up its right to object to a taking merely by inviting the tenant, resident or occupant in.

As noted in the FNPRM,[8] some interested parties have cited FCC v. Florida Power Corp., 480 U.S. 245 (1987), for the proposition that requiring property owners to allow the installation of antennas is merely a permissible regulation, because the building owner has invited the resident or tenant onto the premises. This is a serious misreading of Florida Power. That case involved nothing more than the regulation of

---

[8] FNPRM at n. 186. The FNPRM, at ¶ 45, also cites Florida Power for the proposition that the Commission may "invalidate certain terms of private contracts relating to property rights." This statement is true only in the most general sense -- Florida Power does not say that the Commission may invalidate any term of any contract relating to property rights.

pole attachment rates under former Section 224 of the Communications Act, which authorizes the Commission to regulate those rates in cases in which the owner of the pole or conduit had already voluntarily entered into an agreement making such attachments available to a user. Section 224 did not authorize a taking or expand the lessee's rights to use the lessor's property by giving it new rights. In fact, Florida Power specifically held that Section 224, as it then read, did not give cable companies any right to occupy space on utility poles.[9] Requiring landlords to allow the emplacement of antennas, however, would not be a regulation of an existing relationship, but an expansion of the tenant's or resident's property rights. This, as discussed above, would be a taking.

Loretto also makes it clear that there are strict limits on the argument that a building owner subjects itself to regulation merely by inviting tenants onto the property. "[A] landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." Loretto, at n.17. As the Court goes on to point out, the government cannot "require a landlord to devote a substantial portion of his building to vending and washing machines, with all profits to be retained by the owners of these services and with no compensation for the deprivation of space." Id. This is exactly what is going here. The satellite industry wishes to

---

[9] When Congress amended Section 224 to make attachments to utility poles available on a non-discriminatory basis, it did so expressly, in a language not replicated in Section 207.

obtain access to buildings for its own benefit, without having to pay for the privilege, but this is not permissible under the Fifth Amendment.

Finally, allowing tenants or residents to install antennas in common areas would violate the Fifth Amendment for the same reasons as invalidating the terms of leases or similar real estate agreements. A tenant, resident or occupant has the right to pass through common areas and use them for limited purposes; thus, a tenant's or occupant's rights in common areas are even more limited than they are in demised premises. Even if a person has an ownership interest in the common area (e.g., in a condominium or cooperative), the person has no right to interfere with the rights of other owners in that area.[10] Giving one such tenant, occupant, or resident the right to install an antenna in a common area against the wishes of the other owners would be an occupation, and thereby a taking. The case is even stronger in a rental building, in which the tenant or resident has no ownership interest.

For these reasons, the Commission cannot grant tenants, occupants or service providers the right to install antennas without the consent of the building owner.

B. The Commission Cannot Circumvent the Fifth Amendment by Directing Building Owners To Make Reception Available Using Their Own Facilities.

Some interested parties have implied that the Commission could avoid any Fifth Amendment problem by requiring building

---

[10] See FNPRM at ¶ 60.

owners to make services available to their tenants, residents or occupants using their own facilities.[11] In fact, however, this approach still may constitute a Fifth Amendment taking.[12]

The Supreme Court has recognized that property may be taken without a transfer of ownership or physical invasion, if the government enacts a regulation that prohibits a landowner from realizing any "economically beneficial or productive use of his land." Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2893 (1992). In Lucas, the Supreme Court also recognized that when the economic effect of a regulation has interfered with the owner's investment-backed expectations, something less than a complete loss of value might be compensable. Id. at 2895, n. 8.

It is no simple or inexpensive task to provide video programming services to tenants and occupants of commercial space or residents of apartment buildings. The task is further magnified when each such party has the right to select a different service provider -- possibly including more than one service provider -- and when different service providers offer different service packages. Needless to say, installing

---

[11] Reply Comments of Philips Electronics North America Corp. and Thomson Consumer Electronics, Inc. in Docket No. 95-59, filed May 6, 1996, at 5, 8. See also FNPRM at ¶ 63. Loretto indicates that such a case might not result in a taking because the building owner retains control over the facilities -- but Loretto does not decide that issue, and in any case we do not rely on Loretto in this instance.

[12] Such an attempt would also fail because the Commission has no authority to compel building owners to provide telecommunications services or facilities, as discussed below in Part II.B.

receiving antennas, switching equipment and wiring will be as expensive as it is complex. The economic effects of such a requirement would presumably vary from one building to another, and from one owner to another.

In some cases, a large reduction in the owner's cash flow could constitute a severe injury to the owner's investment-backed expectations. Therefore, any rule that requires building owners to make certain services available to their residents, tenants or occupants could, in a particular case, amount to a regulatory taking under Lucas and related Supreme Court precedent. As we noted earlier, under Bell Atlantic the Commission must avoid any interpretation of Section 207 that presents a substantial constitutional question.

In addition, the Commission simply does not have the authority to impose such an obligation on building owners. As discussed below in Part II.B., Section 207 does not permit the Commission to order building owners to provide "reception service."

C. If There Were a Taking, the Only Proper Measure of Compensation Would be the Market Value to the Building Owner.

The takings objection to Commission-mandated access to private property cannot be avoided by requiring the tenant, occupant, resident or service provider to make a nominal payment to the owner for access. The only permissible measure is the fair market value of what is taken. Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441, 1445 n.3 (D.C. Cir. 1994). In

the case of such economic takings, the compensable market value could be measured in one of two ways: (1) the loss of revenue resulting from the inability to obtain revenue from the provision of service; or (2) the loss of value of the property as a whole resulting from the taking of the sites on which antennas are located. Therefore, the market value would equal the greater of (i) the difference between the rent for tenants' space without the service in question and rent for the same space with the service; and (ii) the fair market value of the space preempted by the antenna.

At one point, the Commission received 432 inquiries from building owners and managers asking for assistance in determining whether the provisions of their leases would have been preempted by the Commission's original proposed rules. See FNPRM, Attachment B. Those inquiries represented only a small number of the potential instances in which an ascertainment of the disputed market values of differing impingements on private property would be required. We do not believe that either the Commission or the courts are ready to handle the massive number of cases that would result from any attempt to mandate access to antennas.

II. CONGRESS DID NOT AUTHORIZE THE COMMISSION TO MANDATE ACCESS TO COMMON AREAS AND PROPERTY SUBJECT TO LEASES AND SIMILAR REAL ESTATE AGREEMENTS OR TO OTHERWISE EFFECT A TAKING.

A. Section 207 Does Not Require the Commission To Void all Restrictions on Reception of DBS, MMDS and Broadcast Signals.

The Commission has more discretion in interpreting Section 207 than some have contended. Rather than a broad mandate to remove all obstacles to the reception of the signals in question, Section 207 is a limited directive aimed at particular types of restrictions.

For example, Section 207 does not say that the ability of every viewer to receive programming by means of DBS, MMDS or broadcast receiving antennas must be entirely unimpeded. Section 207 only requires the Commission, "pursuant to section 303 of the ... Act ...," to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive [certain] video programming services . . . ." This language is conspicuous as much for what it does not say as for what it says. The statute does not require the Commission to preempt any specific restrictions, nor does it require the Commission to preempt all possible restrictions. Section 207 does not confer new authority on the Commission; it merely directs the Commission to exercise the limited authority previously conferred in Section 303 of the Act.

The legislative history, moreover, gives some definition to the directive in Section 207. That legislative history -- discussed at length in the Joint DBS Comments -- indicates that

Congress was concerned with zoning laws and quasi-governmental restrictions, such as homeowners' association rules that limit the placement of antennas.[13] There is no mandate anywhere in the 1996 Act or the legislative history for the Commission to override the terms of privately-negotiated leases or similar real estate agreements, or to direct the invasion of common areas. Since Congress did not use absolute, all-encompassing language and has expressed clear concern only for viewers affected by zoning laws and similar restrictions, the Commission may shape its rules to avoid unreasonable and unconstitutional interpretations of the statute, without contradicting the Congressional intent.

B. Congress Did Not Impose a Duty on Building Owners To Provide "Reception Service."

The Commission's authority under Section 207 is limited. By its terms, Section 207 does not confer new jurisdiction on the Commission. Rather the Commission is directed to act only within its express authority set out in Section 303 of the 1934 Act.[14] Conspicuously absent from Congress' direction in Section 207 is any invocation of the Commission's so-called implied authority in Section 4(i) of the Act. Therefore, authority for any Commission implementation of Section 207 must be found in the language of

---

[13] Indeed, the Commission itself has recognized that the scope of Section 207 does not extend beyond the restrictions enumerated above by limiting its new rule to those cases. FNPRM at ¶ 59.

[14] "[T]he Commission shall, pursuant to Section 303 of the Communications Act of 1934, promulgate regulations ...."

Section 303; any person the Commission seeks to reach in implementing Section 207 must be reachable under its Section 303 powers.

Despite this limitation on the Commission's authority under section 207, some commenters earlier in this proceeding have essentially argued that Congress meant to create an entitlement giving all residents of the United States the right to receive DBS, MMDS and broadcast television signals.[15] Put differently, these parties believe that building owners have the obligation to provide tenants and residents what might be called "reception service." We appreciate the importance of mass communications and of television in particular in modern American society; still, we find it difficult to believe that Congress meant to establish such broad new rights with so little discussion or elaboration, or, indeed, without amending Section 303 to confer additional, implementing powers. Section 207 alone will not carry the burden. Section 207 is only one sentence long and was

---

[15] See Reply Comments of DIRECTV in Docket No. 95-59, filed May 6, 1996, at 6-7; FNPRM at ¶ 62. The comments of some parties seem to be underlain with the belief that Section 207 represents an attempt to advance what might be called "First Amendment principles." While Congress might enact a law with such a goal in mind, that does not mean that Section 207 represents a conflict between two constitutional principles. In fact, while the First Amendment to the Constitution gives all Americans certain *rights*, those rights are not involved in this proceeding, and they do not conflict with the rights protected by the Fifth Amendment. The First Amendment is not an affirmative grant of *power* to the government, but a restriction on the power of government, and Congress must use its specifically enumerated powers to effectuate its purposes. Consequently, neither the Commission nor Congress can authorize the taking of property on the grounds that Fifth Amendment rights are outweighed in a particular case by First Amendment rights.

worthy of only a few lines of explanation in the entire legislative history of the Act. This stands in sharp contrast to other provisions of the Act in which Congress did impose specific obligations on private parties. An examination of those provisions quickly reveals that they are very different from Section 207. These provisions suggest the degree of specificity that is required to meet the standard applied by the court in Bell Atlantic v. FCC, supra.

For example, Section 251 of the Communications Act, added by the 1996 Act, imposes certain obligations on telecommunications carriers, local exchange carriers, and incumbent local exchange carriers. Unlike Section 207, however, Section 251 leaves no doubt that it is imposing duties, and clearly states what those duties are. Section 251 (a) states "Each telecommunications carrier has the duty . . . . " and then lists the duties. Sections 251(b) and 251(c) use similar wording. Similarly, Section 201(a) of the Communications Act states: "It shall be the duty of every common carrier . . . ." Note in this connection that entities become common carriers only by voluntarily holding themselves out to provide a particular service to the public.[16]

Another particularly relevant example is Section 224(f), as amended by the 1996 Act, which states that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit or right-of-way owned or controlled by it." Here again, Congress

---

[16] See, NARUC v. FCC, 525 F.2d 630, 641 (1976).

imposed a duty on certain entities to provide access to their property under certain conditions -- and it clearly stated that it was imposing a "duty," on whom the duty lay, and of what the duty consisted.

Thus, when Congress wishes to impose an obligation, it knows how to do so. Section 207, however, never uses the word "duty." Nor does Section 207 specify the subject of any duty, other than the Commission's obligation to prohibit certain restrictions. As the foregoing examples illustrate, it cannot be said that Section 207 imposes any express obligations on a building owner to ensure that its tenants or residents can receive certain services or to involuntarily offer communications services.

Indeed, as the FNPRM seems to recognize, the Commission is required to interpret Section 207 in a way that avoids substantial constitutional questions.[17] The D.C. Circuit has already made this clear in Bell Atlantic Telephone Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994). As discussed below, any attempt to force building owners to accept the placement of antennas on their premises raises questions under the Fifth Amendment. Given the lack of any express statement in the statute requiring a taking, the Commission must refrain from any interpretation that would impose a taking.

In addition, for the Commission to construe Section 207 to require all building operators to provide "reception services" to

---

[17] FNPRM at ¶ 65, citing Bell Atlantic Telephone Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994).

all their tenants would be inconsistent with its existing television rules. Section 73.684(c) of the Commission's rules, for example, defines television Grade B service as a given signal strength at fifty percent of the locations on the contour fifty percent of the time. In other words, at any given moment, only twenty-five percent of the locations on a Grade B contour can actually receive that signal strength over the air. It would be an unreasonable reading of Section 207 that it require building owners to guarantee that all their residents and tenants receive adequate reception when the Commission's own rules make no such guarantee of universal availability.

Section 207 cannot reasonably be construed to give all viewers the right to receive certain services in the absence of language giving the Commission jurisdiction to direct building owners to provide those services. In fact, however, the Commission cannot effectively adopt such a requirement because it has no authority to direct building owners to do anything, unlike Sections 251, 201(a), and 224(f), discussed above. Section 207 directs the Commission to exercise only the negative power to limit restrictions and not the affirmative power to command property owners to provide reception services.

The Commission's relevant authority under Section 303 is limited to providers of telecommunications services and facilities. See GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973). In enacting Section 207, Congress did not intend to reverse the Supreme Court's holding in Regents v. Carroll, 338